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In the Supreme Court of the United States

DELMA BANKS, Jr.,

Petitioner,

v.

JANIE COCKRELL, Director.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE HONORABLE JOHN J. GIBBONS, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE WILLIAM S. SESSIONS, AND THOMAS P. SULLIVAN, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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The Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable William S. Sessions, and Thomas P. Sullivan, submit this *amicus curiae* brief in support of the petitioner, Delma Banks Jr.[1/]

1/ This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

Amici curiae are former prosecutors, judges, and other public officials who maintain an active interest in the fair and effective functioning of the criminal justice system.[2/] *Amici* are committed to ensuring that the death penalty is fairly administered and is not procured through prosecutorial misconduct and violations of constitutional guarantees.

Although *amici* are concerned that all of the issues presented in the petition raise serious questions about the fairness of petitioner's trial, this brief focuses on petitioner's claims regarding prosecutorial suppression of evidence and ineffective assistance of counsel. These claims by their very nature raise issues that threaten the ability of the adversarial system to produce just results. The fairness of the capital sentencing process is dependent on the proper fulfillment of the roles of prosecutor and defense counsel. The prosecutorial duty to disclose material exculpatory evidence reflects the notion that prosecutors represent the public,

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2/ The Honorable John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. The Honorable Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and of the United States District Court of the Western District of Pennsylvania from 1991 to 1992. The Honorable William S. Sessions served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of Investigation from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He also served as Co-Chair of the Illinois Governor's Commission on Capital Punishment.

which "wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When evidence is wrongfully suppressed, the prosecutor violates his duty to the public and also interferes with defense counsel's ability to serve as an effective advocate. Especially in a capital trial, such conduct diminishes the integrity of the prosecutorial function.

> Criminal trials may be a competitive process filled with sharp practices and gamesmanship. Whether such practices are consistent with justice in ordinary cases may be debated; certainly, however, such practices should cease when the imposition of a death sentence is at stake. Society may feel justified in authorizing its representatives to skirt the line between playing the game rough and playing it fair when it comes to convicting those who are apparently guilty and making certain that they are confined and society is protected. Whether such practices are ever warranted, skirting the line with the potential of denying fair play cannot easily be justified when the issue is whether to execute rather than to imprison.

Mandatory Justice: Eighteen Reforms to the Death Penalty, at 48, http://www.constitutionproject.org/dpi/MandatoryJustice.pdf (2001) [hereinafter "*Mandatory Justice*"].

Similarly, the paramount importance of adequate defense counsel in capital cases cannot be overstated. When a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined. As this Court stated in *Strickland v. Washington*, 466 U.S. 668, 685 (1984):

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or

appointed, who plays the role necessary to ensure that the trial is fair.

The issues presented by this case are therefore of vital importance to lawyers fulfilling essential functions in the criminal justice system, such as judges, prosecutors, and defense counsel.

SUMMARY OF ARGUMENT

The questions presented in Mr. Banks's petition directly implicate the integrity of the administration of the death penalty in this country. The prosecutors in this case concealed important impeachment material from the defense. In addition, the district court found, and the court of appeals agreed, that Mr. Banks received ineffective assistance from his lawyer, at least at the penalty phase of his trial. The court of appeals' reasons for reversing the district court's grant of relief, and refusing to issue a certificate of appealability as to grounds rejected by the district court, are inconsistent with prior decisions of this Court.

Moreover, the court of appeals' treatment of these claims poses a significant threat to the fairness of future proceedings. By placing the burden on the petitioner to discover that the prosecution wrongfully withheld evidence, the court ensured that some of petitioner's claims would never be heard by a federal court, and provided an incentive to prosecutors to withhold evidence in the future. Similarly, by requiring petitioner to demonstrate that *each individual piece* of mitigation evidence that was not presented at trial as a result of his lawyer's substandard performance would have yielded a different result at the penalty phase, the court of appeals established an unreasonable standard by which to evaluate ineffective-assistance claims.

Because the constitutional issues raised in Mr. Banks's petition call into question the reliability of the guilty verdict and death sentence in his case, and because similar

flaws infect the reliability of death sentences around the country, thus substantially undermining public confidence in our capital punishment system, this Court should grant review.

REASONS FOR GRANTING THE PETITION

I. UNFAIRNESS AND INEQUALITY IN THE TRIAL OF CAPITAL CASES UNDERMINES PUBLIC CONFIDENCE IN THE CAPITAL PUNISHMENT SYSTEM

In recent years, mistakes and inequities in the capital punishment system have been the source of much analysis and discussion. A recent study of 4,578 capital cases found that serious errors are identified in nearly 70 percent of trials that lead to imposition of the death penalty.[3/] In addition, several studies have concluded that factors such as race, geography, and wealth play an unacceptable role in both the initial decision to seek the death penalty and its ultimate imposition.[4/] By some accounts, more than 100 death-row

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3/ James Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii, http://justice.policy.net/jpreport (June 12, 2000) [hereinafter, "Liebman, *A Broken System*"].

4/ *See, e.g.*, Raymond Paternoster, *et al.*, *Final Report: An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction*, http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf (Jan. 7, 2003); United States Department of Justice, *The Federal Death Penalty, A Statistical Survey - 1988-2000*, http://www.usdoj.gov/dag/pubdoc.dpsurvey.html (Sept. 12, 2000); *see also Ring v. Arizona*, 122 S. Ct. 2428, 2447-48 (2002) (Breyer, J., concurring in judgment) (citing sources).

inmates have been exonerated since the death penalty was reinstated in 1976.[5/]

These and similar revelations have sparked a spirited public debate over whether the death penalty is fairly administered. In response, the governors and legislators of several states have called for a moratorium on executions until questions regarding the fairness of the capital sentencing process are answered.[6/] In addition, a number of public figures from a wide range of political backgrounds have openly voiced concerns that the death penalty may be unfairly administered and imposed against innocent defendants. For example, in a speech to women lawyers in Minnesota, Justice O'Connor stated,"[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed." *See* Editorial, *Justice O'Connor on Executions*, N.Y. Times, July 5, 2001, at A16 (quoting

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5/ Press Release, *Curran Calls for Abolition of Death Penalty*, http://www.oag.state.md.us/Press/2003/013003.htm (Jan. 30, 2003); Press Release: *The 100th Wrongfully Convicted Inmate is Free After Ten Years*, http://constitutionproject.org/dpi/press_release_100th_exoneration.htm (Apr. 9, 2002).

6/ *See* Lori Montgomery, *Maryland Suspends the Death Penalty*, Washington Post, May 10, 2002, at A10; George H. Ryan, Governor of Illinois, Report of Governor's Commission on Capital Punishment at 1, http://www.idoc.state.il.us/ccp (Apr. 15, 2002); *Toward Greater Awareness: The American Bar Association Call for a Moratorium on Executions Gains Ground, A Summary of Moratorium Resolution Impacts from January 2000 through July 2001*, A.B.A. Sec. of Individual Rts. & Resps. 3, 5-6 (August 2001) [hereinafter "*ABA Study*"]; *see also* A.B.A., House of Delegates Resolution, http://www.abanet.org/irr/rec107.html (Feb. 3, 1997) (calling for a general moratorium on executions).

Justice O'Connor's speech to the Minnesota Women Lawyers Association, July 2, 2001). Similarly, on a recent trip to Cuba, former President Jimmy Carter referred to inequities in the administration of the death penalty in the United States as a human-rights concern, noting that "there is little doubt that the death penalty is imposed most harshly on those who are poor, black, or mentally ill." *Remarks by Jimmy Carter at the University of Havana, Cuba*, at www.cartercenter.org/news/pressreleases (May 14, 2002); *see also* Anthony Spangler, *Judge Expresses Concerns About Fairness of Death Penalty*, Ft. Worth Star-Telegram, July 24, 2001 (describing Texas state judge C. C. "Kit" Cooke's concerns regarding possible deficiencies in the death penalty system he helped to create as a legislator, including racial disparities and inadequate legal representation); James S. Liebman, *et al.*, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1843-44 (2000) ("In April 2000 alone, George Will and Reverend Pat Robertson – both strong death penalty supporters – expressed doubts about the manner in which government officials carry out the [death] penalty in the United States, and Robertson subsequently advocated a moratorium on Meet the Press.").

In announcing Maryland's *de facto* death-penalty moratorium, Governor Glendening explained that "it is imperative that . . . our citizens[] have complete confidence that the legal process involved in capital cases is fair and impartial."[7/] Recent polls suggest, however, that the American public is equally divided over whether the death penalty is fairly administered.[8/] In addition, the vast majority

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7/ Bob Herbert, *Who Gets the Death Penalty?*, N.Y. Times, May 13, 2002, at A17.

8/ Jeffrey Jones, Gallup Poll In-Depth Analysis: The Death Penalty, at http://www.gallup.com/poll/analysis/ia020830viii.asp? (Aug. 2002).

of Americans – more than 80% according to one poll – believe that at least some innocent individuals are executed, and 91% of Americans said that they believe an innocent person has been sentenced to death in the last 20 years.[9/]

Two of the most predominant flaws in the current system are the persistent failure of prosecutors to disclose exculpatory evidence to the defendant – despite a clear constitutional command that they do so – and the often abysmal representation provided to capital defendants at trial. A study evaluating error rates in capital cases from 1973 to 1995 concluded:

> The most common errors – prompting a majority of reversals at the state post-conviction stage – are (1) egregiously incompetent defense lawyers who didn't even look for – *and demonstrably missed* – important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who *did* discover that kind of evidence but suppressed it, again keeping it from the jury.[10/]

In May 2000, the Constitution Project established a committee to address "the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death." *Mandatory Justice* at ix.[11/] The committee's report identified as persistent

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9/ *Id.*; *see generally*, http://www.pollingreport.com.crime.htm (collecting polling data regarding public attitudes toward the death penalty).

10/ Liebman, *A Broken System*, at ii; *see id.* at 6.

11/ The Constitution Project, which is based at Georgetown University, "seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education." *Id.* at ix.

problems in the death penalty system as currently administered the "lack of adequate counsel to represent capital defendants" and the failure of prosecutors to provide the defense with exculpatory evidence. *Id.* at 1, 50.

Both of these flaws are implicated by this case. In his petition for a writ of certiorari, Delma Banks describes the unconstitutional conduct that occurred during his trial, including the apparently deliberate suppression of evidence by the prosecution, and the "dismal performance" of Mr. Banks's counsel. These claims go to the very heart of the effective functioning of the capital punishment system. Yet one of these claims has never been heard by any court. The others, although found to supply sufficient grounds for relief by the district court, were rejected – erroneously, it appears – by the court of appeals.

The courts are responsible to capital defendants and to the public to identify and correct constitutional errors in capital cases. As the Delaware Supreme Court recently observed, "[w]hile the adoption of the death penalty . . . is a legislative prerogative, the judiciary has a special obligation to ensure that the standards governing its application are applied fairly and dispassionately and, just as important, appear to be so." *Stevenson v. State*, 782 A.2d 249, 260 (Del. 2001). In this case, the court of appeals has allowed Mr. Banks's execution to go forward, despite uncured constitutional errors in the process through which he was convicted and sentenced. Because these uncorrected errors are typical of those that have undermined public confidence in the fairness of our capital punishment system, the significance of this case extends well beyond the interests of those who are personally involved in it. The Court should grant review to resolve unsettled questions regarding the federal courts' treatment of common defects in the capital sentencing process.

II. DISCLOSURE OF EXCULPATORY OR IMPEACHMENT EVIDENCE IS ESSENTIAL TO ENSURE FUNDAMENTAL FAIRNESS IN CAPITAL CASES

Under clearly established federal law, a state violates a defendant's right to due process when it fails to disclose evidence favorable to the accused prior to trial and the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In addition, this Court has long recognized that "a prosecutor's knowing presentation of false testimony is 'inconsistent with the rudimentary demands of justice.'" *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of petition for writ of certiorari) (quoting *Mooney v. Holohan*, 294 U.S. 102, 112 (1935)). As a result, due process is violated when a prosecutor fails to correct testimony that he knows to be false, even when the falsehood goes only to the witness's credibility. *Alcorta v. Texas,* 355 U.S. 28, 31 (1957) (per curiam); *Napue v. Illinois,* 360 U.S. 264, 269 (1959). These principles illustrate "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In our system, the prosecutor's role "transcends that of an adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United States v. Bagley*, 473 U.S. 667, 675 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

In this case, the District Attorney's office assured Mr. Banks that there would be no need to litigate discovery disputes. In a letter to Mr. Banks's counsel, the prosecution wrote "we will, without necessity of motions, provide your office with all the discovery to which you are entitled." Pet. at 4. Despite this representation, the prosecution withheld evidence that would have allowed Mr. Banks to discredit two

of the State's most important trial witnesses. The court of appeals wrongly held that Mr. Banks failed to object at the appropriate time to the State's suppression of this evidence.

A. The Court of Appeals Improperly Relied on Fed. R. Civ. P. 15 to Prevent Adjudication of Meritorious *Brady* Claims.

It is undisputed that the State failed to produce in discovery a lengthy transcript of a pre-trial interview of Charles Cook by Bowie County law enforcement officers and prosecutors. The suppressed transcript substantially undermines the reliability of the State's principal guilt-phase witness.[12/] Mr. Banks presented a *Brady* claim in his federal habeas corpus petition, but obviously could not mention specifically the Cook transcript because the State had not yet disclosed its existence at the time the petition was filed. After the State finally produced the transcript – three years after Mr. Banks filed his habeas petition and nearly *nineteen* years after Mr. Banks's trial – the federal magistrate judge issued an order describing the issues that would be heard in the evidentiary hearing, including the State's "withholding exculpatory and impeachment evidence concerning at least two important witnesses – Charles Cook and Robert Farr." Pet. App. A at 50. The transcript was introduced at the evidentiary hearing, and Assistant District Attorney Elliot (who served as second chair for the prosecution at Mr. Banks's trial) confirmed that the District Attorney who

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12/ *See* Pet. at 20 n.10. As noted in the petition, Mr. Cook testified at trial that he had spoken to no one in preparation for his testimony. Pet. at 6, 19. The transcript demonstrates that this statement was false, and that Mr. Cook's trial testimony was extensively rehearsed. Nonetheless, the prosecutors – who were in possession of the transcript at trial – assured the jury that Mr. Cook testified truthfully. *Id.* at 6.

prosecuted the case had the transcript before the trial, but did not disclose it to Mr. Banks. Pet. App. A at 10.

The court of appeals rejected Mr. Banks's *Brady* claim regarding the Cook transcript on the ground that Mr. Banks did not mention the transcript in his federal petition, and did not move to amend his petition under Federal Rule of Civil Procedure 15 once the State disclosed the transcript in 1999. Rule 15(b) provides, however, that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." As a result, and as the court of appeals recognized, "once issues are presented and argued without objection by opposing counsel, such issues are tried by implied consent of the parties and are treated as if they had been raised in the pleadings." Pet. App. A at 51 (quoting *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 389 (5th Cir. 1984)). Here, the magistrate judge informed the State in advance that impeachment evidence regarding Cook would be addressed at the evidentiary hearing, and Mr. Banks's claims regarding the Cook transcript were litigated without objection from the State at that hearing. Nevertheless, the court of appeals ruled that the lack of an amendment to the habeas petition precluded consideration of this aspect of the *Brady* claim. The court stated only that "Banks has not pointed to any authority supporting his contention that, for Rule 15 purposes, an evidentiary hearing equates with a trial." Pet. App. A at 52.

As the petition demonstrates, this Court has suggested strongly that Rule 15(b) *does* apply to evidentiary hearings in habeas corpus cases. Pet. at 34-35. Indeed, the Fifth Circuit itself has operated under that assumption in several cases. *See, e.g., James v. Whitley*, 926 F.2d 1433, 1435 n.3 (5th Cir. 1991), *cert. denied sub nom. James v. Cain*, 516 U.S. 918 (1995); *Streeter v. Hopper*, 618 F.2d 1178, 1180 (5th Cir. 1980); *Mosley v. Dutton*, 367 F.2d 913, 916 (5th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967).

Moreover, the courts and commentators have observed that Rule 15(b) was designed "to avoid the tyranny of formalism," and "to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel." 6A Charles Alan Wright, *et al.*, Federal Practice & Procedure §1491 at 5, 6 (1990); *see Kirkland v. District of Columbia*, 70 F.3d 629, 634 (D.C. Cir. 1995). As a result, courts should and do interpret Rule 15(b) liberally. *See* Wright, *supra*, § 1491 at 6-9. If liberal application of Rule 15(b) is appropriate even in an ordinary civil case, the lack of a formal pleading amendment should not bar consideration of a valid constitutional claim in a capital case, particularly in the absence of any suggestion that the failure to amend affected in any way the State's presentation at the evidentiary hearing.

The court of appeals' rigid adherence to its cramped construction of Rule 15 not only precluded review of the State's withholding of material exculpatory evidence but also departed from the equitable principles that appropriately govern the exercise of the federal courts' habeas power. This Court has long recognized that the writ of habeas corpus should be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *see Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side – the possibility that an error may have caused the conviction of an actually innocent person – is sufficient by itself to permit plenary review of the prisoner's federal claim."); *see also Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.) (granting equitable tolling of applicable statutory limitations period in capital case "when the petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair"), *cert. denied*, 122 S. Ct. 323 (2001).

In this case, Mr. Banks's failure specifically to mention the prosecutors' suppression of the Cook transcript in his petition for habeas corpus is attributable solely to the State's concealment of the existence of the transcript. The State should not be permitted to rely on its own wrongful conduct to avoid adjudication of a clear constitutional violation that may have been responsible for the jury's guilty verdict.

B. The Defendant Should Not Bear the Burden of Discovering that *Brady* Evidence Has Been Wrongfully Withheld.

The prosecution also suppressed the fact that one of the State's key witnesses – Robert Farr – was a police informant paid for his role in the investigation of this case. At trial, Mr. Farr denied that he was a paid informant, and the State did not correct this erroneous testimony. Pet. App. A at 5, 23 (quoting Pet. App. B at 44). Instead, the State assured the jury that his testimony was truthful. The prosecutors told the jury that Mr. Farr "ha[d] been open and honest with you in every way," and that his testimony was of the "utmost significance." Pet. App. C at 44; Pet. at 7, 28-29. After his trial and after Mr. Banks's state habeas petitions had been denied, Mr. Banks located Mr. Farr – who had fled to California on the advice of his law-enforcement handlers – and learned that Mr. Farr was in fact a paid informant in connection with Mr. Banks's case, and that his trial testimony on key points was inaccurate. *See* Pet. at 8, 10, 27 n.12.

In his federal habeas petition, Mr. Banks raised a *Brady* claim based on the State's failure to disclose Mr. Farr's paid-informant status prior to trial, as well as its failure to correct Mr. Farr's false trial testimony that he was not an informant. At his federal evidentiary hearing, Mr. Banks presented testimony from Bowie County Deputy Sheriff Huff, the lead investigator in the case, and two affidavits from Mr. Farr himself, confirming that Mr. Farr

was paid to assist the police in obtaining evidence against Mr. Banks. Pet. App. A at 3, 9-10, 16. The district court adopted the magistrate's recommendation that relief be granted on this claim. Pet. App. B at 6. The court of appeals reversed, holding that Mr. Banks had not shown cause for his failure to develop the factual basis for this claim in state court and that Mr. Farr's and Deputy Huff's testimony was not "exhausted." *Id.* at 19-20, 22-23. The court concluded that, because Mr. Banks suspected that Mr. Farr was a paid informant prior to the conclusion of his state habeas proceedings, he should have made more of an effort to uncover evidence of that fact. Pet. App. A at 19, 21-22.

The court of appeals' decision inappropriately places on the defendant the burden of discovering that the State has wrongfully withheld evidence. Here, the responsibility for Banks's ignorance of Farr's paid-informant status rests solely with the State, which concealed it for years. *See Strickler v. Greene*, 527 U.S. 263, 283 (1999) (facts that documents were suppressed and trial counsel relied on prosecution's open-file policy were "fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim"). This should be sufficient to establish the existence of cause for whatever procedural default may have occurred at the state level. *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (a showing that interference by public officials impeded counsel's efforts to comply with state procedural rule constitutes cause); *Scott v. Mullin*, 303 F.3d 1222, 1229 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.").

Placing the burden on the defendant to discover that evidence has been illegally suppressed is particularly inappropriate in this case, because the prosecutors assured the jury that Mr. Farr testified truthfully, even though they knew he had not. Moreover, the suppressed evidence – *i.e.*, the fact that a State witness was a paid informant – was uniquely within the control of the State. *See Mandatory*

Justice at 50 ("While disclosure of all *Brady* information is important, a special responsibility exists where," as in this case, "the prosecution creates such evidence through plea bargains and other inducements offered to accomplices or informants to secure their testimony."). Mr. Banks already had questioned the only other person who was privy to the relationship – Mr. Farr – and the State assured the jury that his denials were true. By placing the burden on Mr. Banks to discover that this testimony was false, the court of appeals effectively rewarded the prosecutors' dishonest and illegal conduct by insulating the conviction from meaningful review precisely because of their misconduct.[13/] *Cf. Smith v. Zant*, 301 S.E.2d 32, 37 (Ga. 1983) ("Since the prosecution has the

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13/ The court of appeals ultimately did address the merits of this *Brady* claim and held that the suppressed evidence was immaterial. *See* Pet. App. A at 32-33. Although the court acknowledged that Farr's testimony that Banks intended to commit armed robberies and, if necessary, kill the victims, "was crucial to the State's position on future dangerousness," it stated that the withheld evidence – *i.e.*, Farr's status as a paid informant – would not have contradicted that testimony directly, and that Farr's general credibility had been impeached in other ways. Pet. App. A at 32-33. This analysis ignores the independent significance that that the jury might attach to the witness's status as a paid informant in this case. Indeed, Farr's desire to conceal the fact that he was a paid informant was the likely reason that Farr testified (falsely) that it was Banks – not Farr – who needed a gun to commit armed robberies. The court of appeals' apparent supposition that all impeachment evidence is created equal is unfounded. The court similarly defied logic in suggesting that the jury would have regarded Banks's willingness to obtain a gun for Farr as equally probative on the question of future dangerousness as Banks's own alleged intent to commit armed robberies. *See* Pet. App. A at 32.

constitutional duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense."). This ruling sets a dangerous precedent by providing the prosecution with an incentive to conceal *Brady* material for as long as possible.

III. THE INTEGRITY OF THE CAPITAL SENTENCING PROCESS DEPENDS ON ADEQUATE REPRESENTATION AT EACH STAGE OF THE PROCEEDINGS

Adequate legal representation is essential to the effective functioning of the adversarial system. "The lack of adequate counsel to represent capital defendants" has been described as "likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error." *Mandatory Justice* at 1. As Yale law professor Stephen Bright observed:

> Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing. Essential guarantees of the Bill of Rights may be disregarded because counsel failed to assert them, and juries may be deprived of critical facts needed to make reliable determinations of guilt or punishment. The result is a process that lacks fairness and integrity.

Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1837 (1994).

Indeed, some commentators have concluded that the quality of counsel in capital cases is often outcome determinative. Citing Prof. Bright, the Constitution Project's

Mandatory Justice report concluded that "the quality of defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused." *Mandatory Justice* at 1. Similarly, Justice Ginsburg recently reflected: "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial. . . . People who are well represented at trial do not get the death penalty." *ABA Study* at 16 (quoting Justice Ginsburg's remarks on April 9, 2001).

Like many other capital defendants, Mr. Banks did not receive adequate representation in his capital murder trial. His lawyer presented no evidence at the guilt phase of the trial and failed to launch any substantial attack on the State's weak, circumstantial case. Significantly, Mr. Banks's trial counsel did not introduce any evidence to challenge the State's theory as to the time of death, which, as demonstrated in the federal hearing, was both questionable and important.[14/] *See* Pet. at 16-17. Regarding the penalty phase, the magistrate judge found "an almost complete lack of preparation," as counsel "waited until the jury rendered its guilty verdict before instructing Bank[s]'s mother to gather witnesses for the punishment phase, which began the following day." Pet. App. C at 22. Mrs. Banks passed out when she heard the jury read the guilty verdict, and she was taken to the hospital. After she was released, she called prospective witnesses until 3:00 a.m. the morning of the

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14/ The time of death was essential to the case because Mr. Banks reportedly arrived in Dallas (180 miles from the crime scene) less than five hours after the State alleged that the crime occurred. If, as the evidence presented in the federal evidentiary hearing suggests, the time of death was much later, Mr. Banks could not have been guilty. *See* Pet. at 15-17.

penalty phase. Pet. at 13-14. Mr. Banks's lawyer did not interview any of these witnesses before they testified, and did not conduct an investigation into the many mitigating factors and circumstances that would have shown that Mr. Banks did not present a danger to others in the future. Pet. at 11-12, 14; Pet. App. C at 22. Based on this "dismal performance," the district court ordered relief from the death sentence. Pet. App. B at 5, 6; Pet. App. C at 54.

The court of appeals' decision to reverse was not based on a determination that Mr. Banks received adequate representation. On the contrary, the court agreed that "Banks has demonstrated deficient-performance." Pet. App. A at 36; *see id.* at 39, 41. Nor did the court of appeals find that Mr. Banks's lawyers would not have discovered evidence of mitigating factors had an appropriate investigation been conducted. Rather the court separately considered each piece of omitted evidence that it believed was properly before it, and concluded that there was not a reasonable probability that any one piece of evidence – standing alone – would have altered the outcome of the proceeding.[15/] Pet. App. A at 39, 40, 41, 43-44.

In Williams v. Taylor, this Court held that the Virginia Supreme Court's determination that the petitioner was not prejudiced by his lawyer's inadequate performance was "unreasonable, insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." 529 U.S. 362, 397-98 (2000); *see also id.* at 397 (citing with approval the Virginia lower court's "assessment of the totality of the

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15/ The court held that some of the evidence should not have been considered in the federal habeas proceeding because it was "unexhausted." *See, e.g.*, Pet. App. A at 38, 42.

omitted evidence"). In this case, the court of appeals never weighed all of the mitigating evidence that would have been presented had Mr. Banks received adequate representation against the scant aggravating evidence produced by the State. It thus never properly answered the question whether Mr. Banks was prejudiced by his lawyer's errors, as required by *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In contrast, the magistrate judge and the district court – which did properly address the question – concluded that there was a reasonable probability that the jury would not have sentenced Mr. Banks to die if it had been made aware of the facts that would have been brought to its attention by effective counsel. Review should be granted to make clear that a deficient performance by counsel in a capital case cannot be overlooked on the basis of an item-by-item evidentiary review but must be evaluated instead through a fair comparison of what the jury actually heard with the totality of what it would have heard had counsel performed in a competent manner.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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